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IN THE

Supreme Court of the United States

October Term, 1967
No. 1327

SYDNEY N. FLOERSHEIM, ELAINE A. FLOERSHEIM, PAUL PINK, HERMAN WINTERS and RALPH SCHNEIDER,

Petitioners,

vs.

HAROLD J. POWERS, DIRECTOR OF THE DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certorari to the Court of Appeal of the State of California, Second Appellate District, Division Five.

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Respondent.

Petition for Writ of Certorari to the Court of Appeal of the State of California, Second Appellate District, Division Five.

Petitioners, Sydney N. Floersheim, Elaine A. Floersheim, Paul Pink, Herman Winters and Ralph Schneider, pray that a Writ of Certiorari issue to review a judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, whereby the judgment of the Superior Court of the State of California in and for the County of Los Angeles, was affirmed in part and reversed in part.

Opinion Below.

The opinion of the court below is reported at 256 A.C.A. 242. It is set out hereinafter as Appendix "A".

Jurisdiction.

1. The judgment of the Court of Appeal was dated and entered November 21, 1967 (App. "A").

2. Petition for Rehearing in the Court of Appeal was denied on December 11, 1967 (Cert. Rec.).

3. Petition for Hearing in the Supreme Court of California was denied January 19, 1968 (Cert. Rec.). No extension of time within which to petition for certeriorari has been requested.

4. The statutory provisions believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. 2101 (c) and Rule 22 (3) of this Court.

Questions Presented for Review.

1. Is Section 6853 of the California Business and Professions Code, if construed to prohibit the mere sale of forms to be used in an effort by the purchaser to collect debts without services by the seller of the forms, void and unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 1 and 9 of the California Constitution?

2. Is Section 6853 of the California Business and Professions Code void as offending Constitutional requirements of California as to entitling under Article IV, Section 24 of the California Constitution?

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1. of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 1 of the California Constitution provides:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Article I, Section 9 of the California Constitution provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being respon-

sible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . ."

Article IV, Section 24 (now Section 9) of the California Constitution provides:

"A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended." (New section adopted November 8, 1966). (The provisions of this section were transferred from section 24).

California Business and Professions Code Sections Involved.

"6852. 'Collection agency' means and includes all persons engaging, directly or indirectly and as primary or secondary object, business, or pursuit, in soliciting claims for collection or in the collection of claims owed or due or asserted to be owed or due to another."

"6853. Any person using a fictitious name in collecting its own claims with the intention of conveying to the debtor that a third party has been employed and any person, who sells or offers to sell, forms represented to be a collection system, scheme, or device, intended or calculated to be used to collect claims is a collection agency and is subject to the provisions of this chapter."

"6871. 'In addition to any other penalty, any person, firm, corporation or voluntary association, or any officer or director of any corporation or association carrying on business as a collection agency unless *he*

shall hold a valid collection agency license pursuant to this chapter or who carries on such business after the revocation or expiration of any license is guilty of a misdemeanor and punishable by a fine not exceeding *one thousand dollars* ($1,000) or by imprisonment not exceeding *one year* or by both fine and imprisonment.

Duty of prosecuting officer. The prosecuting officer of any county or city shall prosecute all violations of this chapter occurring within his jurisdiction.'"

Statement of the Case.

1. The Cross-Appeals.

Both plaintiff and defendants appealed [Clk. Tr. 123, 129] from different portions of the judgment [Clk. Tr. 113].

2. The Parties.

The plaintiff is Director of the Department of Professional and Vocational Standards of the State of California [Clk. Tr. 83]. Defendants, Mr. and Mrs. Floersheim are engaged as proprietors in the business of selling forms and rendering certain services incidental thereto; the other defendants are their employees [Clk. Tr. 83, 85].

3. The Nature of the Action and the Relief Sought.

Plaintiff brought the action under color of Section 6872, Business and Professions Code, which authorizes plaintiff to sue to enjoin conduct allegedly constituting the unlicensed operation of a collection agency. On the part of plaintiff it was contended that the sale of defendants' forms, both alone and in connection with the incidental services rendered, constituted the business of a collection agency for which defendants were required

to, but admittedly did not, obtain a collection agency license [Clk. Tr. 1-24]. Defendants consented to a limited injunction against the rendition of certain addressing services [Clk. Tr. 211] but otherwise resisted plaintiff's action. In addition, defendants counterclaimed for declaratory relief and for injunctive relief against official harassment of their customers and interference with defendants' business [Clk. Tr. 70-73].

4. The Original Judgment of the Trial Court (Appendix "B").

(a) *On the Complaint:* The Superior Court found that defendants' operations did not constitute the collection agency business within the meaning of Section 6852 [Clk. Tr. 103] and that the sale of forms without the rendition of services did not constitute the collection agency business within the meaning of Section 6853 if validly construed [Clk. Tr. 105], but that the rendition of mailing and forwarding services in connection with the sale of forms constituted the collection agency business within the meaning of Section 6853 [Clk. Tr. 104-105]; also, the court seemingly found that certain forms were objectionable as bearing fictitious names so as to come within the provisions of Section 6853. Accordingly, defendants were enjoined from selling the forms found objectionable and from selling any forms if services were rendered in connection therewith [Clk. Tr. 115]; the sale of forms alone was excepted from the operation of the injunction and declared not to constitute the collection agency business [Clk. Tr. 115-116].

(b) *On the Counterclaim:* The court found that plaintiff had warned defendants' customers not to use forms sold by defendants and threatened such custom-

ers with disciplinary proceedings, with the result that such customers refused to order or use forms supplied by defendants or to pay defendants for forms already purchased from them, to defendants' irreparable injury in loss of investment, profits, good will, employment security, wages, and commissions [Clk. Tr. 101-102]. Accordingly, the court enjoined plaintiff from taking or threatening reprisal against any one by reason only of the mere fact of the sale, purchase, or use of defendants' forms which do not violate other provisions of the injunction or law [Clk. Tr. 111-112].

5. Judgment After Decision by the Court of Appeal (Appendix "C").

The judgment affirmed all relief granted plaintiff and reversed all relief granted defendants.

6. Summary of Material Facts.

For many years stationers and others sold printed forms for the use of creditors and collection agencies in communicating with debtors in attempts to collect debts. A number of forms are arranged in sets or series of graduated intensity or urgency, for use in successive mailings in case of continued nonpayment [Clk. Tr. 101; Deft. Exs. C, F, G, H].

Payment demands are forbidden to simulate legal process (Sec. 527, Penal Code) and are subject to general laws respecting unfair or deceptive business practices (Sec. 3369, 3370, Civil Code; Secs. 17000-17101, 17550, 17500.1, Business and Professions Code). It is not contended that defendants' forms or business methods now in issue violate any of those enactments [Clk. Tr. 81-82]. The sole question is whether defendants are required to be licensed as a collection agency in

order to sell their forms or render incidental mailing and forwarding services.

In 1940 plaintiff's predecessor in authority sought to require a collection agency license of a form-seller under the statutory provision (Sec. 2, Act 1640, Deering's Gen. Laws), since codified as Sec. 6852, Business and Professions Code. The then Attorney General (now Chief Justice) Warren rendered a contrary opinion, holding that

> "the mere sale of forms to a creditor to be used by him in the collection of claims due him cannot be said to be soliciting claims for collection, nor does it constitute the collection of claims even indirectly or as a secondary object. Such person, it seems to us, is in no different position than a stationery store selling forms to be used for such purposes." (Calif. Atty. Gen. Opinion No. NS 2785, July 23, 1940).

In 1941 the collection agency law was amended (Stats. 1941, ch. 1155) and the substance of what is now Sec. 6853, Business and Professions Code, was added. We shall deal with this enactment in detail below in the Argument, but for the present it may be noted that in general the amendment purported to require a collection agency license for the sale of collection forms.

Notwithstanding this enactment the State authorities have not moved against the numerous stationers and others engaged in the open and notorious sale of collection forms [Clk. Tr. 101]. (State witnesses, experts in "collection agency" regulation, generally professed ignorance of such sale [Rep. Tr. 341-356, 600-601,

662], with which the trial judge was quite familiar [Rep. Tr. 600, 621]. But even when samples of others' collection forms were submitted to the State's chief prosecutor in this action "it didn't occur" to her to do anything about it) [Rep. Tr. 662-663].

Defendants have been engaged in the sale of forms since at least 1953 [Deft. Ex. C, pp. 4-5]. Among their customers are well-known financial institutions (Bank of America and Crocker-Anglo Bank) public utilities (Pacific Telephone and Southern California Gas Co.), and collection agencies [Rep. Tr. 566].

The previous litigation some of the forms which defendants formerly sold (since discontinued) were found to contravene other provisions of law, but the State's attempt to impose a collection agency licensing requirement was adjudged against it [Deft. Ex. 1]. The circumstances of this adjudication, which defendants contend is *res judicata,* are discussed below in the Argument.

Three kinds of forms are now involved: Payment Demand, Skip Locator, and Asset Locator [Clk. Tr. 86]. The only one which makes any demand for payment or attempt to collect is the Payment Demand form [Clk. Tr. 33-38]. It sets forth the name of the creditor plainly and requests payment directly to him. No provision is made for remittance to the defendants. Claims are not assigned to defendants, and defendants' compensation is not contingent on or measured by collections; defendants are paid a flat sum per mailing piece [Clk. Tr. 24, 26, 40]. The demand forms are plainly entitled "Payment Demand", which of course they are.

The Skip Locator and Asset Locator forms are short questionnaires designed to verify or ascertain the addressee's current address, employment, etc. [Clk. Tr. 41-43].

Each of these forms is printed on an IBM-style card which is addressed to the debtor and enclosed in a window envelope so that his name and address show through. The envelope bears a Washington, D.C., return address, which is an office maintained by defendants [Rep. Tr. 436]. There is no contention that any of the forms simulates any governmental form or claims identification with any government agency [Rep. Tr. 462].

In the past, the forms have sometimes been addressed and stuffed into envelopes by defendants, sometimes by the creditors to whom they are sold. Without conceding any impropriety, defendants consented to an injunction against their addressing the forms or stuffing them in envelopes [Clk. Tr. 82]. Accordingly, for the purpose of adjudging defendants' operations it should be assumed that the creditor addresses the form and encloses it in the envelope.

The mailing pieces are either stamped (by the creditor or by defendants) or run through defendants' postage meter. Defendants mail them from Washington, D.C. [Clk. Tr. 87-88].

Defendants' connection with the Payment Demand forms ends with their deposit in the mail, except that the post office returns undelivered forms to defendants' Washington office, whence they are returned to the creditors [Rep. Tr. 483-485].

The Skip Locator and Asset Locator forms are sent out with reply envelopes addressed to defendants' Wash-

ington address, postage to be paid by the addressee. When returned to defendants, these forms are sorted and forwarded to the creditors who bought them [Clk. Tr. 89-91].

In 1953 defendants submitted substantially similar forms to the Chief of the Division of Collection Agencies and the members of the Collection Agency Board (plaintiff's predecessor as licensing authority) and received assurances from all of them that a collection agency license was not required for defendants' operations [Clk. Tr. 100].

In 1959 plaintiff's predecessor in office approved certain forms sold by defendants (including forms substantially similar to those now involved) without attempting to require a collection agency license of defendants [Clk. Tr. 100].

The defendants believed and relied on the statements and representations made to them by State collection agency licensing authorities, and in reliance thereon advertised, employed salesmen and office employees, solicited orders, and caused large quantities of forms to be printed, all at great expense to defendants [Clk. Tr. 100-101].

The present head of the collection agency licensing authority refused defendants' request to pass on the propriety of forms submitted to him for approval and advised them to consult their own counsel; he did not disclose any intention of requiring a collection agency license of defendants [Clk. Tr. 100].

Although defendants once received official assurance that they did not require a license, some of their forms were approved by plaintiff's predecessor in office, and

the licensing agency head refused comment on forms which defendants submitted to him, plaintiff now contends that defendants' business requires a collection agency license; moreover, not content with prosecuting this litigation, plaintiff has acted to dissuade defendants' customers from continuing to buy and use defendants' forms [Clk. Tr. 101-102]. The boycott thus officially promoted has been effective, not only with collection agency customers who are vulnerable to threatened license-revocation proceedings [Rep. Tr. 280-285], but also with State-regulated public utility customers which are understandably sensitive to official displeasure [Rep. Tr. 228-231]. The result has been that some customers have refused to reorder forms from defendant, some have returned forms already bought, and some have even refused to pay for forms already used [Clk. Tr. 98, 101-102; Deft. Ex. C. pp. 9-10].

Jurisdictional Grounds Previously Raised.

1. The Judgment of the trial Court held that Section 6853 of the California Business & Professions Code, if construed to prohibit the mere sale of forms without services unless a Collection Agency license was first obtained, would be void and unconstitutional as in contravention of the rights of petitioners under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 1 and 9, of the California Constitution (App. "B").

2. The brief of petitioners in the California Court of Appeal urged that Section 6853 of the Business & Professions Code offended the Constitutional requirements of the State as to entitling under Article IV, Section 24. This was overruled by the trial court and upheld by the Court of Appeal.

3. The brief of petitioners in the California Court of Appeal urged that the requirement of a license for the sale of the forms constituted a restraint in violation of Constitutional guarantees of free speech and press under the Fourteenth Amendment to the United States Constitution and Article I, Sections 1 and 9, of the California Constitution. This was upheld by the trial Court and reversed by the Court of Appeal.

4. The brief of petitioners urged that the requirement of a license for merely selling the forms constituted an unreasonable regulation violative of the due process clauses of the United States and California Constitutions. This was upheld by the trial Court and reversed by the Court of Appeal.

5. The Constitutional issues referred to hereinabove were also raised in the Petition for Rehearing in the Court of Appeal and in the Petition for Hearing in the California Supreme Court, but to no avail.

ARGUMENT.

I.

Section 6853 of the California Business and Professions Code Is Void as It Pertains to a Mere Sale of the Forms and the Petitioners' Business.

The right to free speech and a free press is protected against STATE interference by the 14th Amendment to the United States Constitution (*Near v. Minnesota,* 283 U.S. 697) and by California Constitution Art. I, Sec. 9.

> *These rights are not limited to literary or political expression; they extend also to commercial and other communications* (*In re Schillaci,* 196 Cal. App. 2d 591, 594), subject only to carefully limited police regulations where there is a clear and present danger of substantive evils (*Katzev v. County of Los Angeles,* 52 Cal. 2d 360, 367); and these rights encompass not only the right to publish, but also the right to circulate, as by handbilling (*Lovell v. Griffin,* 303 U.S. 444) and mailing (*Lamont v. Postmaster General,* 381 U.S. 301).
>
> *Licensing is an unconstitutional form of previous restraint on communications: Lovell v. Griffin,* 303 U.S. 444; *Thomas v. Collins,* 323 U.S. 516 (Closing Br. pp. 10-11).

The requirement of a license constitutes unreasonable regulation violative of due process of law. It is well settled that the right to carry on an established business is a property right which is entitled to constitutional protection under the due process clauses of the Federal and State Constitutions:

> *Bueneman v. City of Santa Barbara,* 8 Cal. 2d 405, 407, 408.

As said *In re Fuller*, 15 Cal. 2d 425, 431,

> "a lawful occupation may be regulated for the protection of the public *but the degree of such regulation must be commensurate with the evils to be remedied,*" moreover, "Such a requirement (i.e., licensing) must be based on *a reasonable* classification" (Emphasis supplied). And see *Blumenthal v. Board of Medical Examiners*, 57 Cal. 2d 288.

There can be no doubt, and plaintiff does not deny that the business of form-selling is a lawful occupation. If the *State deems any commercial form objectionable in content or method of distribution it may prosecute it under one or more of the several laws aimed at specific evils. Or, it may enact new legislation specifically directed at any particular evils for which it is believed no remedy now exists.*

A commercial communication comes within the protective clauses of the constitution as set forth hereinabove.

The trial court found that if validly construed, Sec. 6853, Business and Professions Code, does not require a collection agency license for the sale of collection forms constituting a system, scheme, or device [Clk. Tr. 105]. Thus far, defendants agree with the court below.

Despite the finding just referred to, the trial court enjoined the unlicensed sale of forms when coupled with the seller's rendition of mailing services. Let us examine the process by which the trial court reached that result.

The trial court read the literal language of Sec. 6853 so as to require a collection agency license of every sta-

tioner and printer who sells forms represented to be a collection system, scheme, or device, intended or calculated to be used to collect claims. That result would be absurd as the trial court recognized. By a process of "construction" the trial court in effect redrafted Sec. 6853, taking as its theme an incomplete reference to Sec. 6852, which itself is inapplicable, as the court found.

Section 6852 defines "collection agency" to mean and include

> "all persons *engaging,* directly or indirectly and as a primary or secondary object, business, or pursuit, *in soliciting claims for collection or in the collection of claims owed or due or asserted to be owed or due to another.*" (Emphasis supplied).

Briefly stated, the essence of the collection agency business as defined in Sec. 6852 consists of engaging in the solicitation of claims for collection or the collection of claims of others. The trial court did not find that defendants were a collection agency within the meaning of Sec. 6852; rather, the court found that Sec. 6852 was inapplicable.

So far as here material, Sec. 6853 deals only with the sale of forms; it says nothing about the rendition of any services in connection with such sale.

Under the interpretation announced by the trial court, the literal language of Sec. 6853, applicable to form-sellers generally, is limited by reference to a part of Sec. 6852. Thus, the trial court held that a collection agency license is required when the forms are "to be used by the purchaser and seller, *as a primary or secondary object, business and pursuit of said seller, in*

the collection of claims owed or due or asserted to be owed or due to the buyer or to a third person." [Clk. Tr. 106]. The emphasized language is an incomplete reference to Sec. 6852, and its incompleteness is noteworthy. In defining "collection agency" Sec. 6852 speaks of "*engaging . . . in* the collection of claims" (emphasis supplied). Defendants do not do that, as the court found. The sale of forms "to be used" in the collection of claims is something other than, and less than, "engaging . . . in the collection of claims" (Sec. 6852). If the sale of forms "to be used" in the collection of claims amounted to "engaging . . . in the collection of claims" then Sec. 6853 could drop out of the case, for Sec. 6852 would be applicable. But it is not, as the trial court found.

Section 6853 may be read with Sec. 852, and indeed with every other statute on the books, but that does not help plaintiff's case. Section 6852 does not apply to the sale of collection forms, as the Attorney General found in 1940 and as the legislature in effect declared when it adopted Sec. 6853 in 1941. All that is left is the mailing of the forms and the sorting and forwarding of returns. These are mere mechanical and clerical services which do not amount to "engaging . . . in the collection of claims" within the meaning of Sec. 6852, whether such activities are carried on by the post office, by regular mailing and messenger services, or by defendants. In a sense, of course, the goods and services furnished to creditors by these agencies and by stationers and telephone and telegraph companies all assist creditors in communicating demands to debtors and thereby facilitate the collection of claims, but the furnishing of such goods and services is not "engaging . . . in the collection of claims."

Furnishing goods or services which facilitate the carrying on of a business is not the same as engaging in the business. For example, an industrial caterer who fed railway maintenance employees was not "engaged in" interstate commerce although his services undoubtedly facilitated such commerce:

McLeod v. Threlkeld, 319 U.S. 491.

To be engaged in the real estate business means to be engaged in that business in the sense that term usually implies:

Younker v. Comm'r (Cal. App. 6), 256 F. 2d 130, 133;

Dillon v. Comm'r (Cal. App. 8), 213 F. 2d 218, 220.

As for "engaging in the business of collecting" see

James v. United Artists Corp., 305 U.S. 410.

There a West Virginia statute taxed persons "engaging within this State in the business of collecting incomes from the use of real or personal property." Film rentals earned in West Virginia were remitted to appellee distributor outside the state. After referring to the statutory language the Supreme Court said:

> "The conduct of such a business or activity by appellee requires its presence there, (in West Virginia) or that of its agent, and the collection of income within the state by one or the other. As it is stipulated and found that appellee carries on no business within the state, except such as is involved in the solicitation of contracts, and has no collection agent there, and as the exhibitors there are bound to and do pay all sums due under their contracts to appellee at points outside the state, we

> can find no basis for saying that it is engaged in collecting income within the state, either as a business or otherwise." (444).

The conclusion is that in order to be engaged in the business of collecting one must actually collect, either personally or by an agent.

As we retrace the trial court's reasoning this is what we find: Sec. 6853 is literally so broad as to require collection agency licenses of stationers and anyone else who sells collection forms. Recognizing the absurdity of that result, the trial court undertook to limit the sweep of Sec. 6853. But it attempted to do so by reading into Sec. 6853 a part of Sec. 6852, which itself does not cover the case. Sec. 6853 is literally too broad to be enforced as written; Sec. 6852 is too narrow to support plaintiff's case.

We recognize that courts often give statutes sophisticated readings, but what has been done here oversteps the bounds. It is a case, not of interpreting the statutes, but of amending them.

What we have said applies to all of defendants' activities, but more particularly to the use of the "Payment Demand" forms, to which the trial court was evidently referring when it spoke of forms "to be used . . . in the collection of claims." The case is even clearer with respect to the "skip-tracing" forms, which do not make any demand for payment or seek to collect anything from anyone. All the "skip-tracing" forms seek is information. That is not included in any statutory definition of the collection agency business, whether in Sec. 6852, Sec. 6853, or elsewhere. "Skip-

tracing" is not "engaging . . . in the collection of claims," any more than a lawyer's investigator is practicing law when he gets information for use in litigation.

If after all is said, it is believed that the statutes could somehow be stretched to cover defendants' operations, the defendants are still entitled to the benefit of any doubt. Engaging in business as a collection agency without a license is made a crime by Sec. 6871, Business and Professions Code. It is the general rule that penal laws are to be strictly construed in favor of the accused, and the rule is applicable in civil proceedings under a licensing statute which provides criminal as well as civil sanctions. For example, in *McPheeters v. Board of Medical Examiners,* 103 Cal. App. 297, a license-revocation case, it is said:

> "The statute is, in its nature, penal and such laws are to be strictly construed in favor of an accused. Nothing is regarded as intended that is not within the letter as well as the spirit of the act; nothing that is not clearly and intelligibly described in the very words, as manifestly intended by the legislature. Crimes built up by courts or boards with the aid of inference, implication and strained construction are repugnant to the spirit and letter of the law. It would be extremely wrong that one should be reasoned into a penalty when the words of an act do not warrant or justify it."

And in *People v. Holtzendorff,* 177 Cal. App. 2d 788, 795, it is said:

> "The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language in a statute."

Accordingly, even if it were possible (as we submit it is not) to stretch Sec. 6853 to cover defendants' operations, the coverage of this penal law ought to be restricted to what its language necessarily includes, and its language does not necessarily (if at all) include defendants' operations.

Plaintiff argues that collection-form-selling alone constitutes the collection agency business within Sec. 6853. Accordingly, plaintiff seemingly does not attempt to defend the trial court's theory whereby Sec. 6852, itself found to be inapplicable, was yet restored to as an aid to interpretation whereby in the trial court's view Sec. 6853 is rendered applicable to defendants' operations merely because of their rendition of mailing and forwarding services.

II.

Section 6853 of the California Business and Professions Code Violates the Entitling Provisions of the California Constitution.

It is obvious, we suggest, that the sale of collection forms is not the collection agency business unless the legislature has validly declared it to be such. Unlicensed operation of a collection agency is a crime: Sec. 6871, Business and Professions Code. Criminal statutes must be in the English language: California Constitution, Art. IV, Sec. 24. It may be that, like Humpty Dumpty, the legislature is privileged to make a word mean anything it chooses, and hence may call a "collection agency" something quite different, such as form-selling or mailing. But if the legislature is be-

lieved to have done so in Sec. 6853 its action offends against constitutional requirements as to entitling.

In pertinent part, Article IV, Sec. 24 of the California Constitution provides:

> "Every act shall embrace but one subject which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such an act shall be void as to so much thereof as shall not be expressed in its title."

The first attempt to regulate the sale of forms was in 1941: Stats. 1941, ch. 1155, sec. 2, p. 2874, the title of which is as follows:

> "An act to amend Sections 1, 2, 3, 3a, 5, 7, 11, 12, and 15 of an act entitled 'An act to define *collection agencies;* to provide for the enforcement of said act and penalties for the violation thereof,' approved May 14, 1927, relating to *collection agencies* and the regulation, supervision and licensing thereof." (Emphasis supplied).

The statutory language which included reference to the sale of forms was codified as Section 6853, Business and Professions Code, in 1943: Stats. 1943, ch. 133, section 1, p. 882, the title of which is as follows:

> "An act to add Chapter 8, comprising Sections 6850 to 6955, inclusive, to Division 3 of, and to add Section 30044 to, the Business and Professions Code, thereby consolidating and revising the law regulating and licensing *collection agencies,* penalizing violations thereof and repealing acts and parts of acts specified therein." (Emphasis supplied).

Neither of the titles just quoted refers in any way to the stationery business or the addressing and mailing business; both of the titles are confined to collection agencies.

The term "collection agency" has a "natural and obvious meaning," which is "the business of collecting debts, claims and demands."

Cuthbert v. Woodman, 185 Cal. 43, 195 Pac. 673.

> "A collection agency is a concern whose business it is to collect all kinds of claims, as well as notes, drafts, and other negotiable instruments, on behalf of others, and to render an account of the same."
>
> 14 Corpus Juris Secundum 1324.

Having regard to the "natural and obvious meaning" of the term "collection agency" (*Cuthbert v. Woodman, supra*), the use of that term in the titles of the 1941 and 1943 acts did not express the subject of regulating the form-selling business or the addressing and mailing business. If either enactment is construed to extend to the regulation of those businesses it is void as to that subject, which is not expressed in the title.

California Constitution, Art. IV, Sec. 24.

Plaintiff has contended that the words "collection agencies" in the titles of the acts sufficiently embrace the sale of collection forms because that activity is defined as the "collection agency" business in Section 6853, Business and Professions Code. Plaintiff thus asserted that the meaning of words in the title of the act may be expanded by a special definition included in

the body of the act. That is surely a "bootstrap" argument which should be rejected.

> Words in a title must be taken in their common and ordinary means, and the legislature cannot in the body of the act impose another or unusual meaning of a term used in the title without disclosing such special meaning therein . . . it is generally held that a title must be construed in the light of its own language without resort to the terms of the body of the statute.
>
> 82 Corpus Juris Secnumdum 379.

Corpus Juris Secundum cites two cases from the State of Washington, which has a constitutional provision like Art. IV, Sec. 24, of our Constitution: *De Cano v. State,* 110 P. 2d 627, 634, 7 Wash. 2d 613; and *Petroleum Lease Properties, Inc. v. Huse,* 80 P. 2d 774, 195 Wash. 254. In the *De Cano* case the statute involved was titled in reference to "aliens", but in the body of the act "aliens" was defined in such a way as to include some citizens; it was held that as to them the statute was void for want of compliance with the requirement that the subject be embraced in the title. In the *Petroleum Lease* case the same result was reached, it appearing that the title of the act referred to "securities" but in the body of the statute the term "securities" was defined so as to cover things not included in it according to ordinary usage.

The constitutional requirement concerning the entitling of acts is meant to give notice of the subject matter of legislature. That purpose will be frustrated if, under the guise of "definition," the body of a statute is per-

mitted to deal with a subject not fairly embraced within the title according to its common and ordinary meaning.

The plaintiff contends that the statute by which he seeks to require a collection agency license for form-selling and mailing and forwarding services is sufficiently entitled under our Constitution to cover such activities under the head of "collection agencies" because the title includes the words "An act to define collection agencies," etc. The contention is that since the title gives notice of an intention to define "collection agencies," the body of the act can constitutionally define "collection agency" to mean anything, whether or not it is a collection agency according to the common acceptance of the term. The argument loads too much on the word "define", which in this application means "To determine the essential qualities of, as a concept or thing; to describe, expound, or interpret; to explain; hence, to determine the precise signification of; to discover and set forth the meaning or meanings of, as a word or term." (Webster's New International Dictionary, 2d ed.) Etymologically and in common acceptance, to "define" a word means to fix its limits, not to invent a new meaning for it or to expand it out of all recognition. For particular purposes a definition may be more expansive than restrictive, but it still has limits. For example, the word "horse" may be defined so as to include a mare or a pony, but to extend it so as to include an alligator is not definition but falsification. That is the case when "collection agency" is "defined" so as to include form-selling and fowarding services.

Conclusion.

The trial court heard a good deal from plaintiff about the asserted evils to be apprehended from the unlicensed sale and mailing of collection and "skip-tracing" forms. In that connection the plaintiff has frequently adverted to the possibility of deception, but it should be recognized that such apprehensions have nothing to do with this case; rather, they were put forward to give color to plaintiff's technical contentions respecting the coverage of the licensing law. The complaint was not founded on any theory of deception, and plaintiff repeatedly assured the court below that he was not contending for any such thing. The question is merely whether defendants' operations required a license under the statute as it is drawn.

The labored arguments by which plaintiff seeks to stretch the licensing law to cover defendants' operations suggest that in plaintiff's view the law was badly drawn and it is his mission to bend it so as to make his notions of policy prevail. It is understandable that a specialized law enforcement agency will take a single-minded approach whereby it sees itself as the peculiar guardian of public policy in the area of its special interest. But public policy is not single, but manifold; it has not one guardian, but many. Policy considerations other than those which preoccupy plaintiff are also entitled to consideration.

Our economy largely rests on commercial credit, as indeed it must. As long as credit is extended there will be defaulting and absconding debtors. Nonpayment of commercial obligations by some tends to increase the price of credit, goods, and services for those who pay their debts. Public policy obviously favors

the payment of debts. But enforced collection of debts by legal process accounts for only a minute proportion of collections, as indeed it must. The courts could not begin to undertake a substantially larger proportion of collections than they do now. If resort to enforced collection by legal process became generally necessary the judicial establishment would break down and the entire credit system would fail, just as the collection of the public revenue would fail if taxpayers generally refused "voluntary" payment and waited for distraint and lien foreclosure. It is in the interest of the public, as well as that of creditors, that to the extent possible debts be collected by means short of legal process.

It is submitted that for the reasons stated, section 6853 of the California Business and Professions Code is void as it affects petitioners' business and accordingly that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MURRAY M. CHOTINER,
Attorney for Petitioners.

APPENDIX "A."

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Harold J. Powers, Director of the Department of Professional and Vocational Standards, etc., Plaintiff and Appellant v. Sydney N. Floersheim, et al., Defendants and Respondents.

Harold J. Powers, Director of the Department of Professional and Vocational Standards, etc., Plaintiff and Respondent v. Sydney N. Floersheim, et al., Defendants and Appellants. Civ. No. 29934.

Filed: Nov. 21, 1967.

APPEAL from a judgment of the Superior Court of Los Angeles County. Alfred Gitelson, Judge. Affirmed in part; reversed in part.

Murray M. Chotiner for Defendants-Appellants-Respondents. Thomas C. Lynch, Attorney General, and Warren H. Deering, Deputy Attorney General, for Plaintiff-Appellant-Respondent.

Plaintiff Harold J. Powers, as Director of the Department of Professional and Vocational Standards of the State of California, brought suit against defendants Sydney N. Floersheim (also known as S. Floersheim and as Sydney Floersheim), Elaine A. Floersheim, Paul Price (also known as Paul Pink), Maxine Pink, Herman Winters, and Ralph Schneider. The complaint alleges that none of the defendants is licensed as a collection agency, as required by Business and Professions Code section 6853, and that they are in violation of section 6870 of that code. Injunctive

relief is sought to restrain defendants from engaging in business as a collection agency until they are licensed to do so, pursuant to the Collection Agency Act. (Bus. & Prof. Code, Sec. 6850 et seq.)[1] The two pertinent sections around which this case developed are sections 6852[2] and 6853.[3]

Plaintiff contends that the sale of certain forms by the defendant, both alone and in connection with certain mailing and forwarding services rendered, constituted the business of a collection agency for which defendants were required to obtain a collection agency license, but did not. Defendants consented to a limited injunction against the rendition of certain addressing services, but otherwise defendants resisted plaintiff's action. Defendants counterclaimed for declaratory relief and for injunctive relief against official harassment of their customers and interference with their business.

During the early course of the trial, defendants filed with the court a written consent to a permanent injunction in regard to some of their activities, as follows:

> "Defendants consent to a permanent injunction prohibiting them from, directly or indirectly, or

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[1]All section references herein are to the Business and Professions Code unless otherwise indicated.

[2]Sec. 6852: " 'Collection agency' means and includes all persons engaging, directly or indirectly and as a primary or secondary object, business, or pursuit, in soliciting claims for collection or in the collection of claims owed or due or asserted to be owed or due to another."

[3]Sec. 6853: "Any person using a fictitious name in collecting its own claims with the intention of conveying to the debtor that a third party has been employed and any person, who sells, or offers to sell, forms represented to be a collection system, scheme, or device, intended or calculated to be used to collect claims is a collection agency and is subject to the provisions of this chapter."

by any manner or means whatsoever: Soliciting creditors to send unto the defendants or any other persons, any names, addresses, and amounts owing or claimed to be owing to such creditor by a debtor for the defendants to fill in the blanks on forms supplied theretofore or thereafter with the amount of the claim, the creditor's name and address, the name and address of the debtor, and then inserting the completed form in an envelope with the debtor's name and address appearing through the window thereof and sealing the said envelopes; all or any part of the foregoing being done for a fee or charge or sum, other than as an employee of such creditor, paid by the creditor to the persons, or any thereof, enjoined."

The trial court entered detailed findings of fact and conclusions of law and then decreed that the forms sold by defendants, with certain services included as part of the purchase, together comprised a collection system, scheme, and device within the meaning of section 6853, and thus defendants are subject to the provisions of the Collection Agency Act and are required to be licensed thereunder. With the conclusion that defendants sold and offered for sale forms which they represented to be collection systems, schemes, and devices, we agree. The court stated that defendants would not be subject to the licensing requirements if no services were offered as part of the sale of forms. With this we do not agree. The court further enjoined defendants from using certain forms which the court found objectionable due to the use of fictious names thereon as found by the court. We do not find it necessary to limit the injunction, though we concur in this specific finding of objectionable practice.

On the counterclaim, the court found that plaintiff had warned defendants' customers not to use forms sold by defendants, and threatened such customers with disciplinary proceedings, with the result that such customers refused to order or use forms supplied by defendants, or to pay defendants for forms already purchased from them. The court enjoined plaintiff from taking or threatening to take any action against defendants or any other person by reason only of the mere fact of the sale, purchase, or use of defendants' forms which do not violate other provisions of the injunction or of law.

Facts

Defendant Sidney Floersheim owns the S. Floersheim Sales Company located at 7319 Beverly Boulevard, Los Angeles, which as of the time of the trial (February 1964) had been inactive for three or four years. Defendant Elaine Floersheim, the wife of Floersheim, owns the Floersheim Sales Company, also located in the same offices at 7319 Beverly Boulevard, Los Angeles. She also owns the National Research Company, the business address of which is 748 Washington Building, Washington, D.C. Mail for the National Research Company is also accepted at 7319 Beverly Boulevard, Los Angeles. Defendants Paul Price (also known as Paul Pink), Herman Winters, and Ralph Schneider are salesmen of Floersheim Sales Company. Maxine Pink is a part time clerical worker for Floersheim Sales Company.

Defendant Elaine Floersheim does not take an active interest in the affairs of National Research Company. The affairs of that company are managed by a manager in Washington, D.C., under the supervision of Sid-

ney Floersheim in Los Angeles. S. Floersheim does not own any interest in this company, but does oversee the company and determines who will be employed. National Research Company engages only in the business of servicing the forms hereinafter mentioned, and does not render services to any business other than Floersheim Sales Company. "Payment Demand," "Claimant's Information Questionnaire," and "Current Employment Records" are names used by National Research Company to receive mail at its Washington, D.C. address.

Floersheim Sales Company is the sales agent for, and receives compensation from, National Research Company. S. Floersheim is the manager of Floersheim Sales Company. While Floersheim Sales Company is engaged in the sale of forms, it is not engaged in any type of printing business, except that on the various forms it sells, the company does print the numbers thereon and inserts certain information thereon, depending upon the states into which the forms will be sent.

None of the defendants is licensed as a collection agency. Until enjoined, defendants were engaged in the sale to merchants and other businesses in this state of certain printed forms which they represent would "collect" delinquent obligations from debtors in this state.

Summarized in brief, the forms sold were mainly of two types: "payment demand" forms and "skip tracing" forms. The former are primarily designed to collect delinquent accounts, and the latter are designed to locate the delinquent debtor and his assets so that a demand can be made upon him.

In conjunction with the sale of forms, defendants performed certain services for the creditor. After purchasing the forms, the purchaser fills in the name and address of the debtor and then forwards the forms in bulk to the National Research Company in Washington, D.C., which will then seal and meter the envelopes and mail them to the debtors. The various customers pay the costs of this postage. The forms, under names such as "Payment Demand" and "Current Employment Records," bear defendants' return address of "748 Washington Building, Washington, D.C."; or they may bear the return address alone. All returned forms are sorted and returned to the individual creditors.

Defendants or their agents mailed to various creditors within the state brochures describing their forms and the services rendered. These brochures explained the effectiveness of the forms and services in collecting delinquent debts.

Defendants on appeal raise four claimed errors committed by the trial court: (1) that the question of whether defendants' operations require a collection agency license has been decided against plaintiff by the prior judgment in *People ex rel. Mosk v. National Research Co. of Cal.*, 201 Cal.App.2d 765, which is res judicata; (2) that section 6853 is invalid, being in contravention of the entitling requirements of the state Constitution; (3) that the defendants' rendition of incidental mailing and forwarding services in connection with the sale of forms does not extend the coverage of section 6853, which the trial court found to be inapplicable to the mere sale of forms if validly construed; and (4) that the use of the particular forms which the trial court found objectionable does not render section 6853 applicable to defendants' operations.

Plaintiff in his appeal raises two claimed errors: (a) the court's judgment permits defendants to sell, and creditors to use, a system or scheme of collection forms in this state directly in violation of section 6853; and (b) the court's injunctive order against the Director prevents the Director from carrying out his statutory duty as to (1) the enforcement of sections 6852, 6853, and 6870 dealing with unlicensed collection agencies; (2) the enforcement of section 6947 and the regulations thereunder, which prohibit licensed collection agencies from using certain types of forms and letters and from engaging in unfair, misleading practices or illegal means of collection; and (3) the institution of disciplinary action, pursuant to section 6930, against licensed collection agencies for violation of section 6947 and the regulations thereunder.

Collateral Estoppel

Defendants contend that a prior suit[4] between the state and the defendants conclusively decided that the defendants' operations do not require a collection agency license. In the prior action, an injunction was granted against National Research Company for certain deceptive practices, but the court concluded "that the plaintiff is not entitled to an injunction based on the failure of the defendants to be licensed as . . . a collection agency."

The aspect of the res judicata doctrine which defendants invoke is collateral estoppel. Where an issue of fact essential to the judgment is actually litigated and necessarily decided by a valid final judgment, the

[4]*People ex rel. Mosk v. National Research Co. of Cal.*, 201 Cal. App. 2d 765 (No. 118,574 of the Superior Court of the State of California, for the County of Sacramento).

determination is conclusive between the parties and their privies. (*Cromwell v. County of Sac* (1876) 94 US 351; *Todhunter v. Smith* (1934) 219 Cal. 690, 694-95.) Collateral estoppel is not applicable to the decision of a mixed question of fact and law, particularly if there has been an intervening change in the law or a doctrinal change. (*Commissioner v. Sunnen* (1947) 333 US 591, 600-601.) The prior action upon which defendants rely to support their res judicata claim was an action brought by the state against the defendants to restrain defendants from allegedly violating the Collection Agency Act. The statute under which the action was brought was substantially changed after the former action concluded. Section 6872,[5] upon which the present action was based, was added in 1961 to the Business and Professions Code. The 1961 statute eliminated the requirements of the former law that the state must allege and prove irreparable injury and lack of an adequate legal remedy as a condition of relief.

The question whether the defendants fall within the present statute was neither litigated nor decided in the prior case. The issues decided in that case are not identical to the issues presented in this case. The applicabil-

[5]Sec. 6872: "The superior court in and for the county wherein any person carries on, or attempts to carry on, business as a collection agency without first having obtained a license pursuant to this chapter, or carries on such business after the revocation or expiration of any license or during the period of suspension of any license, may, on application of the director, issue an injunction or other appropriate order restraining such conduct.

"The proceedings under this section shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that no undertaking shall be required and the director shall not be required to allege facts necessary to show or tending to show lack of an adequate remedy at law or irreparable injury (Added by Stats. 1961 ch 1403, Sec. 1)"

ity of the former collection agency law to defendants in the prior litigation presented a mixed question of fact and law. A prior determination of such a question does not collaterally estop the state from litigating the same question in the new setting following a change in the applicable law.

The trial court correctly concluded that the prior action did not collaterally estop litigation of this issue in this case.

Constitutional Requirements As To Entitling

In Conclusions of Law, paragraph VI, the trial court found that neither defendants' selling nor offering to sell, printing or causing to be printed, nor composing or causing to be composed, the forms herein involved, or similar forms, was within the subject of the Collection Agency Act. The court concluded, rather, that it was the selling of the forms and, as a part of the sale, agreeing to and performing the mail forwarding and addressing services, as found by the court, which together brought defendants' activities within the Collection Agency Act.

Defendants urge that the selling of forms and the providing of addressing and forwarding services are not within the "natural and obvious" meaning of the words "collection agency," and thus the inclusion of these acts within the purview of the statute is in violation of article IV, section 9,[6] of the state Constitution.

[6]Cal. Const., art. IV, sec. 9: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void . . ." (Adopted Nov. 8, 1966; formerly art. IV, sec. 24.)

When a title specifically shows that within the act the basic terms will be defined, it is considered to be broad or comprehensive in nature and liberally interpreted as long as some rational unity exists between the general subject matter and the title. Such is not the case where a title gives no indication that basic terms will be defined. In this latter case, the title is said to be narrow in scope and will be more closely construed. In the titles involved in the present case, it is clear that in 1941, when section 6853 was added, the reference in the title to the 1927 title[7] showed that the basic terms would be defined within the body of the act. In 1943, when the act was transferred to the Business and Professions Code, the title demonstrated that the "law regulating and licensing collection agencies" was being added to the code in substantially its then present form. The part under discussion here was not amended by the 1943 act.

The heading of the 1927 act, which was referred to in the heading of each amendment, was sufficiently clear to advise that the term "collection agency" would be given a new and broad definition in the body of the act. Defendants have in no way shown any prejudice resulting from the titles of the acts in question. The type of activity which section 6853 seeks to regulate is not so foreign from the business of a collection agency (as defendants would have us believe) that it cannot be said that its inclusion within the act contravenes the entitling requirements set forth in article IV, section 9. (See *Metropolitan Water Dist. v. Marquardt*,

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[7]"An Act to define collection agencies; to provide for the regulation, bonding, supervision and licensing thereof; to provide for the enforcement of said act and penalties for the violation thereof."

59 Cal.2d 159; Cf. *Petroleum Lease Properties Co. v. Huse,* 195 Wash. 254 (80 P.2d 774) and *DeCano v. State,* 7 Wash.2d 613 (110 P.2d 627) (illustrations of narrow titles) with *State v. Department of Public Service,* 1 Wash.2d 102 (95 P.2d 1007) (illustration of broad title).)

Coverage of Sections 6852 and 6853

Sections 6852 and 6853 define those activities that bring a person within the definition of "collecting agency" for purposes of the statutory framework. Section 6852 is in two parts. The first covers those who solicit claims to collect, and the second covers those who actually do collect the claims of another. The services rendered in connection with the forms sold may well have brought the defendants within the group covered by this second portion of the section. This determination, however, is not necessary to resolve the issue before us.

Section 6853 is similarly divided into two parts. The first part deals with those using a fictitious name in the collection of their own debt, and is not involved in the case before us. The second part deals with those selling forms represented to be a collection system, scheme, or device used to collect claims. It is the coverage of this second part which presents the greatest difficulty.

The trial court felt that a literal reading of the section would bring defendants within its bounds.[8] With this we agree. But it also felt that such a reading

[8]"II. None of the provisions of the Collection Agency Act (Business and Professions Code, Section 6850 to 6956) are applicable to the cause here involved other than a literal reading of Section 6853."

would present grave constitutional problems.[9] With this we do not agree. Once the constitutional difficulties are met, then, it is our role to apply the statute as written. If the coverage seems broader than necessary or desirable, this is a problem that is more properly addressed to the Legislature. We turn our attention, then, to the constitutional points raised.

It is first contended that spreading the act to mere sellers of forms used in collecting debts would infringe upon freedom of speech. No opinion, thought expression, or other form of information is contained in the forms under discussion. They are merely tools of a trade, much as a hammer is a tool of the trade of carpentry. The purchaser seeks no information from the form, and the designer seeks to convey none. Assuming arguendo that forms may be construed to be a form of speech, business in the field of the communication of ideas may still be regulated in a reasonable manner. (*Weaver v. Jordan* (1966) 64 Cal.2d 235, 246-7.) In *National Broadcasting Co. v. United States,* 319 US 190, the United States Supreme Court upheld the power of the federal government to require that broadcasters be licensed and that such a license could

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[9]"VII. If Section 6853 of the Business and Professions Code be construed to require a person who sells or offers to sell Forms without offering, or agreeing to perform or performing any services whatsoever in connection therewith; said Forms collectively in a group, constituting a set plan of operation or procedures ('system'), or a systematic plan or program ('scheme'), or a method or project ('device') intended or calculated to be used by *bona fide* creditors to attempt to collect the debts owing unto them from their debtors to be licensed under the Collection Agency Act, would render said Section void and unconstitutional, as in contravention of the rights of Defendants under the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 1 and 9 of the California Constitution."

be denied because of certain behavior on the part of the applicant. In *Hirsh v. City and County of San Francisco* (1956) 143 Cal.App.2d 313, the court of appeal upheld business regulations because they were reasonable, although the business involved elements of public expression. In so doing, they applied principles set out in *In re Porterfield* (1946) 28 Cal.2d 91, a case striking down certain regulations of union organizers because of the high value of the speech involved, but which recognized that regulation could be valid though a balancing test must be taken into account weighing the value of the speech involved. Applying the balancing test to the instant case, we conclude the licensing provision must be upheld since we see no communicative value in the kind of forms involved.

It is contended that defendants' prosecution denied them equal protection of the laws. We recognize that uneven enforcement of the laws can be a denial of equal protection. (*Yick Wo v. Hopkins,* 118 US 356.) Generally, such unequal enforcement must be accompanied by a malicious intent on the part of the prosecution before it constitutes a denial of equal protection (*Snowden v. Hughes* (1944) 321 US 1, 8), rather than just enforcement against those parties who pose the largest threat to the state, or enforcement that is the most efficient means of enforcing the law, given the limited resources of the state agency (*Oyler v. Boles* (1962) 368 US 448, 456). A denial of equal protection involves the unequal treatment of persons equally situated. In the instant case, there has been no showing that there were others involved in the designing and selling of such forms as their primary business who have not been prosecuted. Nor has there been showing of administrative bias against these defend-

ants. Assuming for the moment that stationery stores were covered by the act, certainly a stationery store whose dealings in such forms is minimal does not pose an "equal threat" to the interest to which the state seeks control. We find no merit in the contention that these defendants have been denied equal protection. (See *People v. Gray*, 245 Cal.App.2d .....*)

The Injunction Against Defendants

It is contended that requiring defendants to obtain a license is an unreasonable interference with their right to conduct a legitimate business. Economic regulation will not be interfered with unless there is *no* reasonable basis for its promulgation. (*Doyle v. Board of Barber Examiners* (1963) 219 Cal. App. 2d 504; *Hope v. Contractors' etc. Board* (1964) 228 Cal.App.2d 414.) The defendants in the instant case vigoriously promoted their forms in a manner that intimately involved them in the debt collection process of large companies. The Legislature has manifested a clear intent to closely scrutinize those in such activity. The Legislature has concluded that debt collection is a fertile field for the attraction of elements whose effectiveness comes from an overzealous use of coercion, and that persons entering this field are to be screened because of this risk. That this is a reasonable and continuing area where such control is needed, see generally "Report of the Senate Interim Committee on Collection Agencies, Private Detectives and Debt Liquidators (1957)," particularly with reference to abuses that come from forms (pp. 35-38, 40-41). The California Supreme Court has upheld licensing requirements in the small-loans field, an area which presents the potential for many of the

*254 A.C.A. 289

abuses that are present in the collection field. (*In re Fuller* (1940) 15 Cal.2d 425, 431.) We do not intend to impugn defendants' moral character by recognizing that they are dealing in an area which the state feels may attract undesirable elements and therefore require a person entering that field to procure a license.[10]

The question then is whether these defendants "represented" their forms to be a "collection system, scheme, or device." There is no question but that defendants successfully sought to sell their forms by extolling their effectiveness. There can be no question but that they were intimately involved in the debt collection business within the area of their activity; the defendants being thus intimately involved, it seems equally clear that the legislative intent was to cover them. There seems to us little question but that the factors that make these forms a "system, scheme, or device" were actively brought to the attention of potential customers in the promotional activities of defendants sales representatives. A statement by defendant S. Floersheim and received in evidence is typical: he said, to one S. L. McClary, that when a debtor sees the envelope from Washington, D.C., "That makes the difference because this is a foreign name to them. Do you follow what I mean? Now they open it. Now they read it. Now it's no longer coming directly from the creditor, meaning you, it's coming from somebody else saying now get in and pay it. This is why it works—the power of the third party." There was the required representation that these forms were effective because of elements that added pressure to pay or supply information over and above that which would come from a normal bill or information-request for a creditor. The

[10]Nowhere is there a claim that the license fee is excessive.

consequence is that defendants acted as a collection agency as it is defined by the second portion of section 6853.

The trial court only enjoined the defendants from the use of various of its forms that gave the appearance of emanating from a third party. The trial court enjoined defendants from providing services as a part of its package-sale of forms. The state is entitled to a broader injunction, one that enjoins these defendants from further sales of, or offering for sale, forms which they represent to be a "collection system, scheme, or device" (or portion thereof) without being validly licensed. To the extent that the trial court's order enjoins defendants from performing certain services in conjunction with sales of forms, and to the extent that it prevents the sale of forms suggesting the involvement of a third party, all as part of a "collection system, scheme, or device," the order is proper. In addition thereto, the plaintiff is entitled to an injunction restraining defendants from further offering for sale or sale of forms, with or without services of defendant, which forms are represented by defendants to be a "collection system, scheme, or device," which includes all the forms involved in this case, until they are duly licensed as a collection agency.

The case is remanded to the Superior Court with directions to deny relief to defendants on their counterclaim, and to issue an injunction against defendants in conformity with this opinion.

Stephens, *J.*

We concur:

Kaus, *P. J.*

Hufstedler, *J.*

APPENDIX "B."

Original Judgment.

Superior Court of the State of California, for the County of Los Angeles.

Harold J. Powers, Director of the Department of Professional and Vocational Standards of the State of California, Plaintiff, vs. Sydney N. Floersheim a/k/a S. Floersheim and as S. N. Floersheim; Elaine A. Floersheim; Paul Pink; Maxine Pink; Herman Winters; and Ralph Schneider, Defendants. No. 826 756.

BE IT REMEMBERED:

The above-entitled cause came on duly and regularly for trial on February 18, 1964, in Department 19, of this Court, Alfred Gitelson, Judge Presiding, without a jury, a jury having been duly and regularly waived, and was heard on said day, and on the 19th, 20th, 21st, 24th and 25th of February, 1964.

Plaintiff, (sometimes hereinafter designated as Bureau) appeared by Stanley Mosk, then Attorney General of the State of California, Warren H. Deering, Deputy Attorney General, Clara Kauffman, Deputy Attorney General, by Clara Kauffman and Warren H. Deering, their counsel.

Defendants appeared in person and by Murray M. Chotiner, their Counsel.

The case was tried upon: The "Complaint for Injunction" (filed October 10, 1963); the "Amendment to Complaint" (filed February 18, 1964), it having been stipulated: "That the 'Answer' of Defendant then on file should constitute the 'Answer' thereto," though the allegations of said "Amendment to Complaint" were

in fact admitted by Defendants (Minute Orders February 18, 1964; August 11, 1964); the "Answer of Sydney N. Floersheim, also known as S. Floersheim and S. N. Floersheim, Sydney N. Floersheim doing business under the fictitious firm name of S. Floersheim Sales Co., Elaine A. Floersheim, Elaine A. Floersheim, doing business under the fictitious firm names of Floersheim Sales Company and National Research Company, Paul Pink, Maxine Pink, Herman Winters, and Ralph Schneider" (filed November 20, 1963); "Amendment to Answer to Complaint (Counter Claim)" (filed February 25, 1964); and the "Second Amendment to Answer to Complaint" (filed February 25, 1964).

It having been stipulated that "Pretrial Conference Waived" (Minute Order, January 7, 1964); it was so Ordered and Pretrial Conference was waived.

Evidence both oral and documentary having been received; Points and Authorities filed; Argument heard; all by the Court considered; and the Court having made and filed its Minute Order for Judgment (June 30, 1964), and being advised in the premises, made and filed its Findings of Fact and Conclusions of Law constituting the Decision of the Court, in accordance therewith, it is now

ORDERED, ADJUDGED AND DECREED:

I. Plaintiff is authorized under Section 6872 of the Business and Professions Code to institute action to enjoin persons from carrying on, or attempting to carry on, the business of a Collection Agency without first having obtained a License pursuant to the Collection Agency Act (Business and Professions Code, Division 3, Chapter 8, Sections 6850-6956.1).

II. The selling and offering to sell, the Forms, herein-involved, and as a part of the purchase thereof the services hereinbefore Found, constitute a Collection System, Scheme and Device intended and calculated to be used to collect claims within the meaning of Business and Professions Code, Section 6853.

That Defendants, other than the Defendant Maxine Pink, being engaged in said business, to wit: The sale and offering to sell said Forms with said services, having as a primary or secondary objective the assistance and participation by the Defendants in the collection of claims owed or due or asserted to be owed or due to another, are subject to the provisions of Chapter 8, Division 3, Collection Agency Act of the State of California; and so long as said Defendants as a part of the sale and offering for sale of said Forms offer and agree to, and do perform the services Found, they are subject to the provisions of, and required to be licensed under the said Collection Agency Act.

III. That unless and until Defendants be licensed as a Collection Agency, pursuant to said Collection Agency Act, none of said Defendants may sell or offer for sale the said Forms and as a part of such sale offer, agree to and perform the services hereinbefore Found.

IV. Neither the composing or causing to be composed, nor the printing or causing to be printed, nor the sale or offering to sell Forms thereof, said Forms collectively constitute a set plan of operation or procedures ("system"), or a systematic plan or program ("scheme"), or a method or project ("device") intending and calculated to be used by the Buyers thereof to collect claims and debts owing to them by debtors, no services being offered or agreed to be performed by

the Sellers of said Forms, is within or subject to the said Collection Agency Act; and Defendants in selling or offering to sell only such Forms, no services being offered or agreed to be performed, are not required to be licensed under said Collection Agency Act.

V. If Section 6853 of the Business and Professions Code be construed to require a person who sells or offers to sell Forms without offering, or agreeing to perform or performing any service whatsoever in connection therewith; said Forms collectively in a group, constituting a set plan of operation or procedures ("system"), or a systematic plan or program ("scheme"), or a method or project ("device") intended or calculated to be used by *bona fide* creditors to attempt to collect the debts owing unto them from their debtors to be licensed under the Collection Agency Act, would render said Section void and unconstitutional, as in contravention of the rights of Defendants under the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 1 and 9 of the California Constitution.

VI. That Plaintiff's cause or causes of action are not barred by the doctrine of *res judicata* nor does the doctrine of collateral estoppel apply against Plaintiff as to any facts or causes of action herein.

VII. Until further Order of Court, the Court retaining jurisdiction to amend, modify, or supplement the Injunction, the Defendants, and each of them, their agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert therewith, and having knowledge, express or implied, of the Injunction, should be enjoined from, within the State of

California, doing or attempting to do, directly or indirectly, or by any manner or means whatsoever:

VII.1. Throughout the Injunction:

(i) The word "Person" shall designate and include: a natural Person; a Corporation; a Partnership; a Fictitious Trade Name business; a Trust; and any other type of business organization;

(ii) The word "Defendants" shall designate and include; The named Defendants, other than Maxine Pink, and each of them; and each of their agents, servants, employees, attorneys, successors, assigns, distributors, and all persons acting in concert therewith, or with any of the foregoing, and having knowledge, express or implied (CC 18 and 19), of the Injunction;

(iii) The masculine gender shall include the feminine and neuter; the singular includes the plural; the plural the singular;

(iv) The word "forms" shall designate and include: Any document designed and intended to be used in the collection of claims owed or due, or asserted to be owed or due, to the person, or his principal, to whom they are sold or supplied, or attempted to be sold or supplied, by Defendants.

VII.2. Soliciting any Person to purchase or be supplied with any Forms, sold and supplied by Defendants, and thereupon or thereafter sending to Defendants, or any other person, any names, addresses and amounts due and/or owing, or claimed to be due and/or owing, to such person (to whom the Forms are sold or supplied) for the Defendants, or any other person, to fill in or complete the Forms, (either with the amount of the claims or the creditor's name or address,

or address of the alleged debtor, or otherwise) and then inserting the completed Form in an envelope, sealing and mailing it; or any variation of the foregoing; and

VII.3 Selling or offering for sale, or soliciting any Person to purchase or be supplied with, any Forms which bear as a part thereof: The, or any, name or address of Defendants; or any Fictitious Name or Trade Name of or used by Defendants; or any other fictitious name or designation (for illustration, Exhibits 1-A, 1-B, 1-C, 2, 3, 4, 5, and 6-B); designed, or intended, to convey, or stating, or representing, or intended, to convey, or stating, or representing or intimating to the Debtor to whom said Form is to be sent, that a third person has been by the Creditor employed, or retained, or designated, or used to make demand for payment or to effectuate collection; and

VII.4 Selling or offering for sale, or soliciting any Person to purchase or be supplied with, any Forms, and furnishing or supplying, or offering to furnish and supply for the same charge or selling price, or for a fee, included or separate, or otherwise, any services whatsoever, therewith or pertaining thereto, other than as an employee of said Person; and

VII.5 Selling or offering for sale, or supplying or offering to supply:

(i) Exhibit 1, so long as there appears thereon the legend to the postmaster, after 5 days return to "748 Washington Building", being the address of Defendants; and

(ii) Exhibit 1-A, so long as there appears thereon the legend "Claimant's Information Questionnaire, 748 Washington Building", being a Fictitious Name or des-

ignation of Defendants, and their address and place of business; and

(iii) Exhibit 1-B, so long as there appears thereon the legend, "Change of Address, 748 Washington Building", being a Fictitious Name and designation of Defendants, and their office and address; and

(iv) Exhibit 1-C, so long as there exists thereon the legend, "Current Employment Records, 748 Washington Building", being a Fictitious Name and designation of Defendants, and their office and address; and

(v) Exhibit 2, so long as there appears thereon the legend "by Payment Demand" ("notice mailed from Washington, D.C. by Payment Demand"), being a Fictitious Name and designation of Defendants; and

(vi) Exhibit 3, so long as there appears thereon the legend "by Payment Demand" ("notice mailed from Washington, D.C. by Payment Demand"), being a Fictitious Name and designation of Defendants; and

(vii) Exhibit 4, so long as it contains the legend, "Payment Demand, 748 Washington Building", being a Fictitious Name and designation of Defendants, and their office and address; and

(viii) Exhibit 5, so long as it contains the legend, "Payment Demand, 748 Washington Building", being a Fictitious Name and designation of Defendants, and their office and address; and

(ix) Exhibit 8-C, so long as it contains and offers the services the subject of the Divisions thereof entitled "prepaid meter service", "meter service—pay as you go", and "5c postage stamp"; and

(x) Exhibit 6-A, so long as it contains the legend to return to "748 Washington Building", being the office and address of Defendants; and

(xi) Exhibit 6-B, so long as it contains the legend, "Current Employment Records, 748 Washington Building", being a Fictitious Name and designation of Defendants, and their office and address; and

(xii) Plaintiff's Exhibit 7, so long as it contains the legend, "748 Washington Building", being the office and address of Defendants; and

(xiii) Exhibit 8, so long as it offers the service and contains the legends and illustrations in paragraphs numbered 2, 3, 4 and 5; and

(xiv) Exhibit 21-A: Form "Jud-A", so long as it contains the legend "By Payment Demand" or "State of New York"; Form "Jud-B", so long as it contains the legend "By Payment Demand"; Form "IBM L-23349", so long as it contains the legend "Payment Demand, 748 Washington Building" and/or "State of Missouri"; Form "IBM L22916", so long as it contains the legend "By Payment Demand" Form "Jud-13", so long as it contains the legend "Payment Demand, 748 Washington Building"; Form "UDF-14", so long as it contains the legend "Payment Demand, 748 Washington Building"; Form "CD-16", so long as it contains the legend "Payment Demand, 748 Washington Building"; Form "CDF-17", so long as it contains the legend "Payment Demand, 748 Washington Building"; Form "NS-4", so long as it contains the legend "Payment Demand, 748 Washington Building"; and the Form "Notice" ("Interrogatory #17 (page 4.)"), so long as it contains the legend "748 Washington Building"; and

VII.6 Engaging directly or indirectly, and as a primary or secondary object, business or pursuit:

(i) In soliciting of claims for collection, unless and unil first licensed as a Collection Agency under the laws of the State of California; or

(ii) Of collecting or assisting others in the collection of claims owed or due or asserted to be owed or due to such others, unless and until first licensed as a Collection Agency under the laws of the State of California; or

(iii) Selling, offering for sale, supplying, or offering to supply, Forms containing as a part thereof a Fictitious Name, with the intention of conveying to the Debtor that a third person has been employed or retained to make demand for the payment or to effectuate collection thereof.

Nothing in this Injunction contained shall be construed or deemed to enjoin Defendants either or any thereof:

(i) From composing and publishing, or composing or publishing, or selling or offering for sale, or supplying or offering to supply, any Forms composed or designated and intended to be used by the purchaser, for the collection of debts and claims asserted by him to be due and owing to him from Debtors; notwithstanding that such Forms, collectively when used together as a set, or separately, constitute and are, or are by Defendants represented to be and deemed or believed by the purchaser thereof to be and constitute a set plan of operations and procedures ("system"), or a systematic plan or program ("scheme"), or a method or project ("device") for the attempted collection by

the purchase of said Forms, of the debts asserted by him to be due and owing from his Debtor; no services whatsoever being offered or agreed to be performed by Defendants in connection therewith or with reference thereto; (which Forms do not otherwise violate the Injunction nor any other applicable laws of the State of California (CC 3369; CC 3370; The Unfair Practices Act, Business and Professions Code Section 17000 to 17101; Business and Professions Code Section 17500; Business and Professions Code Section 17500.1; Penal Code Section 527)).

VIII. Until further Order of the Court, the Court retaining jurisdiction to amend, modify or supplement the Injunction, the Plaintiff, his agents, servants, employees and attorneys should be enjoined:

VIII.1 From taking or threatening to take any action against Defendants either or any thereof, or taking or threatening or advising any Person that such Person is subject to action or prosecution, criminal or civil, or Disciplinary Proceedings under the Collection Agency Act (Business and Professions Code, Chapter 8, Division 3) by reason only of the mere fact:

(i) As to Defendants either or any thereof: The composing and publishing, or selling or offering for sale, or supplying or offering to supply, any Forms; and

(ii) As to any other Persons: The purchasing or using of any Forms by reason of the mere fact that such Forms when used separately or collectively as a set, constitute, or are by Defendants represented to be, or are deemed or believed by the purchaser to be and constitute, a set plan of operation or procedure ("system"), or a systematic plan or program ("scheme"),

or a method or project ("device") for the attempted collection by the purchaser of the debts asserted by him to be due and owing from his Debtors; (which Forms do not otherwise violate the Injunction nor any of the other applicable laws of the State of California (CC 3369; CC 3370; The Unfair Practices Act (Business and Professions Code 17000 to 17101); Business and Professions Code Section 17500; 17500.1; Penal Code 527)).

IX. That Plaintiff take nothing by his Complaint as against the Defendant Maxine Pink.

X. That Maxine Pink have and recover of and from Plaintiff her costs and disbursements herein, hereby taxed in the sum of $.....

XI. Other than as herein expressly adjudged, neither party is entitled to any other or further relief as against the other.

XII. That Plaintiff and the Defendants, other than Maxine Pink, do bear their own costs and disbursements.

Dated this 16 day of October, 1964.

/s/ ALFRED GITELSON
Alfred Gitelson
Judge of the Superior Court

———

APPENDIX "C."

Judgment After Court of Appeal Decision.

Superior Court of the State of California, for the County of Los Angeles.

Harold J. Powers, Director of the Department of Professional and Vocational Standards of the State of California, Plaintiff, v. Sydney N. Floersheim, aka S. Floersheim, and as S. N. Floersheim; Elaine A. Floersheim; Paul Pink; Maxine Pink; Herman Winters; and Ralph Schneider, Defendants. No. 826 756.

The Court of Appeal, Second Appellate District, having on November 21, 1967 filed its decision affirming in part and reversing in part the judgment entered herein on October 19, 1964; the Supreme Court of the State of California having on January 17, 1968 denied defendants'-appellants' Petition for Hearing; the Remittitur having been filed in this court on January 22, 1968, it is

ORDERED, ADJUDGED AND DECREED:

I. Any of the Conclusions of Law or portions thereof filed herein by this court on October 16, 1964, which are inconsistent with this judgment are hereby set aside and vacated.

II. The Judgment entered by this court on October 19, 1964 is hereby vacated and this Judgment After Decision of the Court of Appeal is entered in place thereof.

III. Plaintiff is authorized under section 6872 of the Business and Professions Code to institute action to enjoin persons from carrying on, or attempting to carry on, the business of a collection agency without

first having obtained a license pursuant to the Collection Agency Act (Business and Professions Code, division 3, chapter 8, sections 6850-6956.1).

IV. The selling and offering to sell the Forms herein involved, constitute a collection system, scheme, and device intended and calculated to be used to collect claims within the meaning of Business and Professions Code section 6853.

That defendants, other than the defendant Maxine Pink, being engaged in said business, to wit, the sale and offering to sell said Forms represented to be a collection system, scheme or device intended or calculated to be used to collect claims, are subject to the provisions of chapter 8, division 3, Collection Agency Act of the State of California, and are required to be licensed under said Collection Agency Act.

V. That unless and until defendants be licensed as a collection agency, pursuant to said Collection Agency Act, none of the defendants may sell or offer to sell said Forms or any other forms represented to be a collection system, scheme or device intended or calculated to be used to collect claims.

VI. That plaintiff's cause or causes of action are not barred by the doctrine of *res judicata* nor does the doctrine of collateral estoppel apply against plaintiff as to any facts or causes of action herein.

VII. Until further Order of court, the court retaining jurisdiction to amend, modify, or supplement the Injunction, the defendants, and each of them, their agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert therewith, and having knowledge, express or implied, of the In-

junction, should be enjoined from, within the State of California, doing or attempting to do, directly or indirectly, or by any manner or means whatsoever:

VII.1 Throughout the Injunction:

(i) The word "Person" shall designate and include: a natural Person; a Corporation; a Partnership; a Fictitious Trade Name business; a Trust; and any other type of business organization;

(ii) The word "defendants" shall designate and include: The named Defendants, other than Maxine Pink, and each of them; and each of their agents, servants, employees, attorneys, successors, assigns, distributors, and all persons acting in concert therewith, or with any of the foregoing, and having knowledge, express or implied (CC 18 and 19), of the Injunction;

(iii) The masculine gender shall include the feminine and neuter; the singular includes the plural; the plural the singular;

(iv) The word "Forms" shall designate and include: any document designed and intended to be used in the collection of claims owed or asserted to be owed or due.

VII.2 Soliciting any person to purchase or be supplied with any Forms, sold and supplied by defendants, and thereupon or thereafter sending to Defendants, or any other person, any names, addresses and amounts due and/or owing, or claimed to be due and/or owing, to such person (to whom the Forms are sold or supplied) for the defendants, or any other person, to fill in or complete the Forms (either with the amount of the claims or the creditor's name or address, or address of the alleged debtor, or otherwise) and then inserting the completed Form in an envelope,

sealing and mailing it; or any variation of the foregoing; and

VII.3 Selling or offering for sale, or soliciting any person to purchase or be supplied with, any Forms which bear as a part thereof: The, or any, name or address of defendants; or any Fictitious Name or Trade Name of or used by defendants; or any other fictitious name or designation (for illustration, Exhibits 1-A, 1-B, 1-C, 2, 3, 4, 5, and 6-B); designed, or intended, to convey, or stating, or representing, or intimating to the debtor to whom said Form is to be sent, that a third person has been by the creditor employed, or retained, or designated, or used to make demand for payment or to effectuate collection; and

VII.4 Selling or offering for sale, or soliciting any person to purchase or be supplied with, any forms represented to be a collection system, scheme or device intended or calculated to be used to collect claims, notwithstanding the fact that such forms contain no fictitious name, trade name, or any other name of any kind, and notwithstanding the fact that no services are furnished or offered to be furnished by defendants in connection with said forms.

VII.5 Selling or offering for sale, or supplying or offering to supply:

(i) Exhibit 1
(ii) Exhibit 1-A
(iii) Exhibit 1-B
(iv) Exhibit 1-C
(v) Exhibit 2
(vi) Exhibit 3
(vii) Exhibit 4

(viii) Exhibit 5
(ix) Exhibit 8-C
(x) Exhibit 6-A
(xi) Exhibit 6-B
(xii) Exhibit 7
(xiii) Exhibit 8
(xiv) Exhibit 21-A

VII.6 Engaging directly or indirectly, and as a primary or secondary object, business or pursuit:

(i) In soliciting of claims for collection, unless and until first licensed as a collection agency under the laws of the State of California; or

(ii) Of collecting or assisting others in the collection of claims owed or due or asserted to be owed or due to such others, unless and until first licensed as a collection agency under the laws of the State of California; or

(iii) Selling, offering for sale, supplying, or offering to supply, Forms containing as a part thereof a Fictitious Name, with the intention of conveying to the debtor that a third person has been employed or retained to make demand for the payment or to effectuate collection thereof.

(iv) Selling or offering for sale, or soliciting any person to purchase or be supplied with, any forms represented to be a collection system, scheme or device intended or calculated to be used to collect claims, notwithstanding the fact that such forms contain no fictitious name, trade name, or any other name of any kind, and notwithstanding the fact that no services are furnished or offered to be furnished by defendants in connection with said forms.

VIII. That plaintiff take nothing by his complaint as against defendant Maxine Pink.

IX. That defendants take nothing by their counterclaim against plaintiff.

X. That Maxine Pink have and recover of and from plaintiff her costs and disbursements hereby taxed in the sum of $ ..... .

XI. Other than as herein expressly adjudged, neither party is entitled to any other or further relief as against the other.

XII. That plaintiff have and recover of and from defendants, except Maxine Pink, his costs and disbursements herein, hereby taxed in the sum of $.....

Dated this 4 day of March 1968.

/s/ ALFRED GITELSON
Alfred Gitelson
Judge of the Superior Court

SUPREME COURT, U. S.

IN THE

MAY 10 1968

Supreme Court of the United States

October Term, 1967
No. 1327

SYDNEY N. FLOERSHEIM, ELAINE A. FLOERSHEIM, PAUL PINK, HERMAN WINTERS, and RALPH SCHNEIDER,

Petitioners,

vs.

HAROLD J. POWERS, DIRECTOR OF THE DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

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IN THE

Supreme Court of the United States

October Term, 1967
No. 1327

SYDNEY N. FLOERSHEIM, ELAINE A. FLOERSHEIM, PAUL PINK, HERMAN WINTERS and RALPH SCHNEIDER,

Petitioners,

vs.

HAROLD J. POWERS, DIRECTOR OF THE DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

Respondent Harold J. Powers, Director of the Department of Professional and Vocational Standards of the State of California, hereinafter referred to as "Director", respectfully files this Opposition to Petition for Writ of Certiorari to review a judgment of the Court of Appeal of the State of California, Second Appellate District, Division 5.

OPINION BELOW

The opinion of the California Court of Appeal (Appendix A of Petition) is reported at 256 A.C.A. 242, 63 Cal. Rptr. 913.

JURISDICTION

Director agrees with petitioners' statements as to "Jurisdiction."

QUESTIONS PRESENTED FOR REVIEW

Director agrees with petitioners' statements as to "Questions Presented For Review."

CONSTITUTIONAL PROVISIONS INVOLVED

Director agrees with petitioners' statements as to "Constitutional Provisions Involved."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS INVOLVED

Petitioners (hereinafter referred to collectively as "Floersheim") have quoted relevant sections of the California Business and Professions Code. The Director asserts the following additional sections are relevant:

> Section 6870. "Necessity of license. No person shall engage within this State in the business of collecting claims for others or conduct within this State a collection agency as defined in Sections 6852 and 6853 of this chapter unless he shall hold a valid collection agency license pursuant to the provisions of this chapter."
>
> Section 6875. "Application for license; name. Application for a license shall be made in writing to and filed with, the chief in such form as may

be required by the chief. In addition to the information or documents required by this chapter, the chief may require the submission of any other information, evidence, statements, or documents.

"Every application for a license shall state, among other things that may be required, the name of the applicant with the name under which the applicant will do business, and the location by street and number, city and state of the office of the business for which the license is sought.

"No license shall be issued in any fictitious name which may be confused with or which is similar to any federal, state, county, or municipal governmental function or agency, or in any name which may tend to describe any business function or enterprise not actually engaged in by the applicant, or in any name which is the same as or so similar to that of any existing licensee as would tend to deceive the public, or in any name which would otherwise tend to be deceptive or misleading."

STATEMENT OF THE CASE

Director agrees with the statements made by Floersheim under the headings:

1. "The Cross-Appeals."
2. "The Parties."
3. "The Nature of the Action and the Relief Sought."
4. "The Original Judgment of the Trial Court."
5. "Judgment After Decision by the Court of Appeal."

SUMMARY OF MATERIAL FACTS

Director agrees with Floersheim's "Summary of Material Facts" (petn. p. 7) except as follows:

1. Floersheim states that, "It is not contended that defendants' forms or business methods now in issue violate" any enactments respecting unfair or deceptive business practices. (Petn. p. 7, para. 6.) This statement does not accurately reflect the Director's position. At the trial the Director urged that the question of whether Floersheim's operations fell within the terms of Business and Professions Code section 6853 did not depend upon a determination that the forms were misleading or deceptive. The Director noted, nevertheless, that petitioners' forms probably were misleading and fraudulent. (Vol. 1, Rep. Tr. p. 123, 125; Vol. 2, Rep. Tr. p. 462; Vol. 3, Rep. Tr. pp. 720-21.)

2. Floersheim states that State authorities have not moved against numerous stationers and others engaged in the "open and notorious sale of collection forms." Petn. p. 8.) This statement is not accurate. The trial court did not find that stationers and others were engaged in "open" or "notorious" sale of forms. (Cl. Tr. p. 101.)

While the trial court did find (Finding III.40, Cl. Tr. p. 101) that the Director and his predecessors had known for many years that many stationery stores and printers regularly sell forms designed, intended and calculated to assist purchasers thereof to collect debts, there is no evidence that the Director or his predecessors had actual knowledge of such practices.

Furthermore, the uncontradicted evidence shows that the Collection Agency Licensing Bureau since at least December 1960 has prosecuted persons for selling a sys-

tem of collection forms and has advised others to cease and desist from such unlicensed activity. (Vol. 2, Rep. Tr. p. 327, lines 7-25; Exh. 22; Exh. 24-C at Cl. Tr. p. 208; Vol. 2, Rep. Tr. p. 327, line 20 to p. 328, line 11; p. 332, line 22 to p. 333, line 15; Exh. 25-B at Cl. Tr. p. 206; Exh. 24-D at Cl. Tr. p. 210; Vol. 2, Rep. Tr. p. 356, lines 9-18.) Additionally, George Soloff, Chief of the Bureau, testified that he had observed the stationery store forms submitted by defendants for the first time during the trial and that appropriate action would be taken if warranted. (Vol. 2, Rep. Tr. p. 342, lines 18-25; p. 345, lines 1-9.) As a result of the foregoing, the trial court properly found that respondent had not enforced or attempted to enforce any laws against Floersheim in a discriminatory manner nor has Floersheim been denied equal protection of the laws. (Cl. Tr. p. 99.)

3. Floersheim omits to mention that in some instances debtors who received Floersheim's forms have sent payments to the latter instead of to the creditor. (Vol. 2, Rep. Tr. pp. 490-93.)

4. Floersheim states that respondent's predecessor in office approved certain forms sold by Floersheim without attempting to require the latter to obtain a collection agency license. (Petn. p. 11.) This statement is inaccurate. The evidence shows that Floersheim submitted certain skip tracing forms to the former Director who stated in a letter that those forms, if used by a licensed collection agency, would not violate Business and Professions Code section 6947(h). The Director noted, however, that he reserved the right to change this policy. (Exh. 8-C.) The former Director testified that when he wrote the letter, he did not intend

to pass upon the question of whether a license was required for the sale of such forms. (Vol. 2, Rep. Tr. p. 397, lines 19-22.)

5. Floersheim omits material facts which show that Floersheim is intimately involved in the business of debt collection. The uncontradicted facts show: (1) Floersheim distributed to customers brochures which stated that petitioners' forms "don't analyze—they just collect". (Cl. Tr. p. 40.) (2) Sydney Floersheim represented to a potential customer that the collection forms are effective because they lead the debtor to believe a third party has intervened and is seeking to collect the debt. (App. A, p. 15 Petn.) (3) Floersheim is not engaged in the printing business and does not print the forms which are sold, although Floersheim does number the forms and insert certain information thereon. (Vol. 2, Rep. Tr. pp. 451, 452.)

JURISDICTIONAL GROUNDS PREVIOUSLY RAISED

Director agrees with Floersheim's statements as to "Jurisdictional Grounds Previously Raised."

ARGUMENT

I.

SECTION 6853 OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE IS A VALID REGULATION UNDER THE STATES' POLICE POWER.

1. The Business of Assisting Others to Collect Delinquent Debts or Claims Is Subject to Regulation by the State.

Watson v. State Commissioner of Banking, 223 A.2d 834, 836 (Me. 1966); appeal dismissed, 389 U.S. 9 (1967);

Koepple v. Morrison, 84 Cal. App. 137, 141, 257 P. 590, 591 (1927);

15 Am. Jur. 2d p. 555; 54 ALR 2d 883-85.

2. The California Statutes Do Not Prohibit Persons From Engaging in the Business of Assisting Others to Collect Delinquent Debts Provided They Qualify and Obtain a License to Engage in Such Activity.

California Business and Professions Code Sections 6870, 6875.

Floersheim has made no claim that the regulatory statutes impose upon applicants or licensees unreasonable licensing fees or unreasonable restrictions, nor is there any claim by Floersheim that they have sought a license or that they have been improperly denied a license.

The fact that a license, if granted, may subsequently be revoked does not necessarily invalidate the licensing regulation.

Jones v. Opelika, 316 U.S. 584, 599 (1947).

3. The Sale of the Forms by Floersheim Does Not Constitute an Exercise of Speech or Press Within the Meaning of the First Amendment of the United States Constitution.

The forms are mere instruments or devices to be used to collect delinquent debts in a purely commercial venture and are not vehicles for the transmission or interchange of ideas, viewpoints or opinions.

Weaver v. Jordan, 64 Cal. 2d 235, 246, 49 Cal. Rptr. 537, 545, 411 P.2d 289, 297, cert. den. 385 U.S. 844 (1966).

No opinion, thought, expression or other form of information is contained in the forms. (App. A, p. 12 Petn.)

4. Assuming Floersheim's Activities in Selling the Forms Constitute the Exercise of a Form of Speech or Press, Such Activity Is Subject to Regulation.

Jones v. Opelika, 316 U.S. 584, 597 (1947);
Acuff v. Mueller, 93 F.Supp. 146, 148 (1950);
In re Porterfield, 28 Cal. 2d 91, 101, 168 P.2d 706, 713 (1946).

5. California Business and Professions Code Section 6853 Is Neither Ambiguous nor Vague as Applied to Petitioners' Activities.

Floersheim appears to claim that section 6853 requires some type of strained or unreasonable interpretation in order to apply to Floersheim's activities. (Petn., pp. 16-21.) If this be the contention, it is without merit. Neither the trial court nor the Court of Appeal found any ambiguity in the statute. (App. A, p. 11 of Petn.) Nor in any of the proceedings before those courts did Floersheim interpose the defense that the statute is unconstitutionally vague or ambiguous. (Cl. Tr. pp. 54-60, 70-75.)

II.

CALIFORNIA BUSINESS AND PROFESSIONS CODE DOES NOT VIOLATE THE ENTITLING PROVISIONS OF THE CALIFORNIA CONSTITUTION

1. No Federal Question Is Involved in This Issue Since the Constitution of the United States Contains No Provision Regarding Entitling of Statutes and Petitioners Make No Claim That the Alleged Faulty Entitling of the Statute Infringed Upon Any of Petitioners' Rights Accorded Them Under the United States Constitution.

Chase Nat. Bank v. Mobile & O.R. Co., 30 F. Supp. 565-68 (1939);

Sutherland, *Statutory Construction*, 3rd Ed., Vol. 1, Section 1701.

2. Section 6853 Does Not Violate the Entitling Provisions of Article IV, Section 9 of the California Constitution.

The title of the original enactment of the statute into which section 6853 was inserted provided:

> "An *Act to define collection agencies;* to provide for the regulation, bonding, supervision and licensing thereof; to provide for the enforcement of said act and penalties for the violation thereof." (Emphasis added.)

The foregoing title called attention to the fact that the term "collection agency" would be given a new and broad definition in the body of the act. (App. A, p. 10 of Petn.)

See *Metropolitan Water Dist. v. Marquardt*, 59 Cal. 2d 159, 172, 379 P.2d 28, 34 (1963);

State v. Department of Public Service, 1 Wash. 2d 102, 95 P.2d 1007, 1010 (1939).

Moreover, Floersheim has not complained of being misled or prejudiced by the title to the statute. Indeed, Floersheim's claimed conversations with the Director's predecessors since 1953 regarding the forms indicate Floersheim was well aware that the statutory definition of a "collection agency" included the business of selling a "collection system, scheme, or device intended or calculated to be used to collect claims." (Petn. p. 11.)

CONCLUSION

The Director submits that Floersheim has not presented any substantial federal question which would warrant the granting of certiorari. Additionally, the California Court of Appeal correctly decided all constitutional questions raised by Floersheim. For these reasons Director respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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